

National Audubon Society



California

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National Audubon Society
Chapters of California

Altacal
Buena Vista
Central Sierra
Conejo Valley
Eagle Lake
Eastern Sierra
El Dorado
Fresno
Golden Gate
Kern
Kerncrest
Laguna Hills
Lake Almanor
La Purisima
Los Angeles
Madrone
Marble Mountain
Marin
Mendocino Coast
Monterey Peninsula
Morro Coast
Mount Diablo
Mount Shasta Area
Napa-Solano
North Cuesta
Ohlone
Palomar
Palos Verdes/South Bay
Pasadena
Peregrine
Plumas
Pomona Valley
Redbud
Redwood Region
Sacramento
San Bernardino Valley
San Diego
San Fernando Valley
San Joaquin
Santa Barbara
Santa Clara Valley
Santa Monica Bay
Sea and Sage
Sequoia
Sierra Foothills
South Coast
Stanislaus
Tulare County
Ventura
Whittier
Wintu
Yolo
Yosemite Area

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Office of
Special
Federal Communications Commission
Washington, DC 20554

Mr. William Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W. Room 814
Washington, D.C. 20554

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April 14, 1998

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Ex Parte Letter Re: FCC Docket No. 97-296 and MM Docket No. 970182

Dear Chairman Kennard:

On behalf of the 67,000 members and 53 chapters of the National Audubon Society in California, I hereby submit comments regarding the Federal Communications Commission's Notice of Proposed Rule Making in the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Station Transmission Facilities (the Proposed Rule). Our view is that, pursuant to Federal law, the Proposed Rule will have a significant impact on the environment, and therefore requires the FCC to prepare an Environmental Impact Statement.

Actions Requiring an EIS

The National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA), requires the Commission and all other federal agencies to conduct an Environmental Impact Statement (EIS) for all major federal actions significantly affecting the quality of the human environment. Moreover, the Commission's regulations at 47 CFR §1.1307(a) require thorough environmental analysis of any action that may affect a listed species or may lead to construction in wetlands. The NEPA requirements supersede all other Commission rules that may be inconsistent with NEPA. 47 C.F.R. 1.1303. The term "action" encompasses rules and regulations such as the Proposed Rule.

The Proposed Rule is a Major Action Significantly Affecting the Quality of the Human Environment

Under NEPA, the determination of what constitutes a major action significantly affecting the environment is to be made on a case by case basis, judging both the context and intensity of the particular proposal. The impacts to be examined include ecological, aesthetic, historic, cultural, economic, social or health impacts. In addition, there are three types of effects that must be examined:

1. *Direct effects*, which are caused by the action and occur at the same time and place;
2. *Indirect effects*, which are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable; indirect effects "may include . . . effects on air and water natural systems, including ecosystems," 40 C.F.R. 1508.8; and
3. *Cumulative effects*, which result from the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions. 40 C.F.R. 1508.7.

Effects include ecological effects, such as the effects on resources and on the components, structures, and functioning of affected ecosystems. 40 C.F.R. 1508.8. The Proposed Rule is a major action with significant direct, indirect and cumulative effects.

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Direct and Indirect Effects.

By exempting construction of hundreds of broadcast towers from state and local law and review, the Proposed Rule would result in the construction of towers without regard to ecological, aesthetic, historic, cultural, economic, social or health impacts, many of which are regulated only by state and local law. Since these state and local laws were originally passed to address significant public concerns, it is clear that waiving them will have a significant impact on the environment. This is especially true in the case of the construction of towers under the Proposed Rule. Many of these broadcast towers are more than one thousand feet high, and some reach heights of two thousand feet or more. Many towers are located in or near wetland areas, streams, and other protected areas. Other towers are located or planned to be located at the tops of mountains, many in remote and sensitive areas. Conducting a federal NEPA review of this proposed federal action would allow the FCC to determine whether the exemption of so many different sites from state and local environmental review would have environmental impacts and consequences that could reasonably be avoided.

In addition to many other ecological, aesthetic, historic, cultural, economic, social or health impacts, the construction of the towers without regard to local and state regulations will significantly impact populations of migratory birds, many of which are in decline, and some of which are threatened or endangered.

It is estimated that between 2 million and 4 million migratory birds are killed each year as a result of collisions with TV and radio towers. It is well documented that higher levels of bird mortality result when these towers are sited on high ground in the four major migratory flyways. Red safety lights often used on towers have been found to attract flocks of migrating birds, leading to increased bird injury and mortality.¹ For example, a 38-year study of a single television tower in west central Wisconsin documented the deaths of 121,560 birds representing 123 species, primarily long-distance neotropical migrants.² Many species of neotropical migratory birds are experiencing steep population declines and the siting of numerous new broadcast towers in migration corridors could greatly exacerbate this problem. (See attached chart of documented bird kills and representative studies, also attached hereto).

Cumulative Effects.

Cumulative effects are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonable foreseeable future actions, regardless of what agency (federal or non-federal) or person undertakes such actions. 40 C.F.R. 1508.7. The Proposed Rule will have significant cumulative impacts when combined with siting and construction of each tower, which by themselves will be major actions. "[W]hen deciding the potential significance of a single proposed action (i.e., whether to prepare an EIS at all), a broader analysis of cumulative impacts is required. The regulations clearly mandate consideration of the impacts from actions that are not yet proposals and from actions – past, present, or future – that are not themselves subject to the requirements of NEPA." Fritofson v. Alexander, 772 F.2d 1225, 1242-3 (5th Cir. 1985).

The Proposed Rule must be the subject of an EIS which considers not only the cumulative effects of the Proposed Rule and the siting and construction of towers, but also the cumulative actions. In Fritofson v. Alexander, *supra*, the court noted that scoping regulations require connected, cumulative, and similar actions to be considered together in the same EIS. In other words, the EIS must address not just the action of adopting the Proposed Rule and waiving state and local law, but also the foreseeable actions of siting and constructing towers. In addition, the EIS must address not only the effects of the Proposed Rule and siting and constructing of towers, but it must also address the cumulative effects of all of these actions. Courts have previously established guidelines for the incorporation of cumulative effects on migratory species into NEPA decisionmaking. Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988).

¹ TV Towers Take Deadly Toll on Night-Migrating Birds, Buffalo News, October 6, 1996, 1C; Mysterious Flights, Under Cover of Night, Chicago Tribune, November 3, 1985, F14.

² C. Kemper, A Study of Bird Mortality at a West Central Wisconsin TV Tower from 1957-1995, The Passenger Pigeon, Vol. 58, No. 3, 1996.

In the case of bird mortality, for example, it is easy to see how the cumulative effects could be synergistic, that is, where net adverse cumulative effect is greater than the sum of the individual effects. If one tower is built, and 10,000 birds of one species are killed, it may not be enough to effect the long term health of that species' population, over more than one year. On the other hand, 30,000 or 40,000 deaths may result in a population crash with respect to that species.

Other Applicable Federal Law

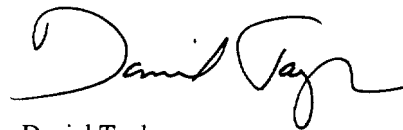
In addition to NEPA requirements, the federal government has significant responsibility for the conservation of migratory birds and their habitats under four *migratory bird treaties* (with Mexico, Canada, Japan, and the former Soviet Union) that would be undermined by the Proposed Rule. The four treaties cover numerous species of neotropical migratory birds, many of which are experiencing steep declines in populations due in some part to collisions with tall structures in migratory flyways, including broadcast towers.³ In line with the federal government's treaty obligations for the protection of migratory birds, current FCC policy calls for locating broadcast towers outside of migratory bird flyways wherever possible.⁴

Moreover, before the Commission can resolve to issue the Proposed Rule, it must consult with the USFWS to ensure that the proposed rule will not harm any threatened and endangered species. Section §7(d) of the *Endangered Species Act* requires consultation whenever a federal action may affect a protected species. Threatened and endangered migratory birds are among those that suffer from collisions with broadcast towers. Thus, in addition to preparing an EIS, the Commission must consult with USFWS before proceeding with the proposed rule.

We believe that your proposed rule will exacerbate this problem by removing necessary avenues of environmental oversight that could otherwise lead to more environmentally sound siting decisions for broadcast towers. State and local laws that govern the siting and operation of broadcast towers help avert or reduce these impacts. By preempting these laws, the proposed rule would ensure that construction and operation of broadcast towers will cause significantly greater harm than state and local laws currently permit.

Thank you for your consideration of these comments. When the Commission decides to move ahead with the EIS, please add us to the public comment list so that we may submit comments on the draft EIS.

Sincerely,



Daniel Taylor
Executive Director
National Audubon Society-California

³ See, e.g., WatchList, an annual roster of birds that are in serious decline. Compiled by scientists from Partners in Flight member organizations, which include the National Audubon Society and the United States Fish & Wildlife Service, the WatchList targets bird species with at-risk populations. Threats to these species include habitat degradation, development, and collisions with structures.

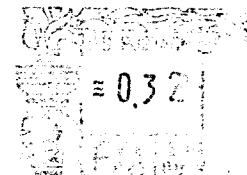
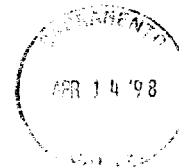
⁴ In the Matter of Implementation of the National Environmental Policy Act of 1969, 49 F.C.C.2d 1313.

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